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No. 62

Supreme Court of the United States

OCTOBER TERM, 1962

NORTHERN NATURAL GAS COMPANY, a Corporation,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR REHEARING OF THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

CHARLES C. McCARTER
State Corporation Commission
State Office Building
Topeka, Kansas
Attorney for Appellee

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The State Corporation Commission of the State of Kansas prays that this Court grant a rehearing of its Order of February 18, 1963, reversing and remanding the judgments of the Supreme Court of Kansas.

REASONS FOR GRANTING REHEARING

1. The Court's order and judgment are based upon a misunderstanding of the facts in this case. The Court concludes that the State Ratable Take Orders "do not regulate 'production or gatherings'" of gas. (p. 5) On the contrary the record herein demonstrates, even as the dissent points out, that the whole purpose and effect of the State's orders were "to limit production—the physical act of drawing gas from the earth". (See page 4 of Dissent.)

The fact that the orders are directed to purchasers of gas instead of producers does not prevent the orders from being regulations of production. The physical act of producing gas only occurs in a practical sense when a purchaser of gas opens the valve on a particular well and takes gas therefrom. When this occurs the purchaser actually takes gas from the very bottom of the well bore. When the purchaser commits this act and only then is gas produced.

Furthermore, it is the purchaser here who has the legal right to produce the gas. The producer has no such right. Thus, Appellant's contract with Republic (producer) states that "Northern [purchaser] shall have the right to regulate the rate of flow of gas from each well to the extent necessary to enable it to purchase the aggregate volumes of gas herein agreed to be purchased." (R. 151) Therefore to regulate the "rate of flow of gas from each well" the State Commission of necessity had to address its ratable take orders to the party having actual control over the production of gas and having the legal right to regulate the production and the taking of gas, namely the purchaser.

Thus for the Court to conclude that "none of its [Northern's] activities in Kansas shown upon this rec-

ord involve 'production and gathering in the sense that those terms are used in Paragraph 1b' " (p. 5) reflects a misunderstanding of the facts in the record and a failure to appreciate the practical facts of the gas business so necessary to a proper determination of the law that should govern the gas industry and its customers.

2. The majority again misconceives the facts when it rules that a danger of interference with the federal regulatory scheme arises because the state's ratable take orders "shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of thousands of natural gas wells within the state [citation]—a task which would otherwise presumably be the State Commission's." (p. 7)

The State's Orders do not shift such a burden to the shoulders of the interstate purchaser. The latter has by contract voluntarily assumed this burden, if it indeed be a burden. For instance, Northern agrees to the following in its contract with Republic: "The volumes of gas delivered to Northern hereunder as measured at pipeline pressures and temperatures should be computed by *Northern* from the meter records . . . The gas to be delivered hereunder shall be measured by adequate meters of standard type installed operated and maintained by *Northern* at its sole expense . . . Upon Republic's request, Northern shall mail or deliver to Republic for checking and calculation all meter charts and other data or record used in the measurement of gas . . . The charts and records shall be kept by *Northern* for a period of five (5) years for the use of both parties." (R 140-142)

Thus it is Northern, the purchaser, who has by contract obligated itself to keep all the records and charts necessary to demonstrate and compute the "output of thousands of natural gas wells within the state". The State's Orders do not *shift* that burden to Northern.

As a matter of fact it is the purchaser alone who has the necessary records to determine whether gas is being produced from the wells ratably. The only way the State Commission or the producers can secure such information is to ask the purchaser for it. It is the purchaser alone who is in a position to provide ratable taking. Northern recognizes this fact and accordingly in numerous contracts agrees to regulate its purchases so as to take gas ratably and agrees to undertake the necessary computations to assure ratable taking. For instance in its contract with Cities Service Oil Company Northern agrees to purchase gas "ratably (without discrimination) with all natural gas purchased and produced by Northern from the same common source of supply situated in the Kansas portion of the Hugoton Gas Field". And Northern agrees that "such ratable purchases shall be . . . computed under such proper and reasonable nondiscriminatory formulae as Northern may from time to time employ . . ." (R 77)

In view of these contractual commitments the State shifted no computation burdens to the purchaser who had already voluntarily accepted such burdens. To hold otherwise, as the Court did, is to rule contrary to the facts in the record.

3. Basing its judgment upon such misunderstanding of the facts in this case the Court, speaking through the majority, concluded that though there perhaps was no manifest conflict here, nevertheless there was some "possibility of collision" between the state ratable

take orders and the terms of the Natural Gas Act and that therefore the state orders must fall.[1]

Such conclusion besides not being based on fact has no prior law to support it. Always before the Court has held as it did in *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 at 714: "* * * this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested' ". See also *Kelly* v. *Washington*, 302 U.S. 1; *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440; *Buck* v. *California*, 343 U.S. 99, 101-102; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507 and cases cited in each case.

There is no clear and manifest conflict between the state orders and the Natural Gas Act. The majority opinion concedes that "collision between the state and federal regulation may not be an inevitable consequence" but asserts that "there lurks" an "imminent possibility of collision". (p. 8) Presumably this statement rests on the opinion's assumption that the state orders "could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale consumers who sell to consumers in other states". (p. 7) It is to be noted, however, that the opinion does not explain how or in what re-

[1] The Court said and this seems to be the essence of the majority's position: "Therefore although collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation ordained by Congress." (p. 8)

spects the state orders would or could impair this federal authority. It is significant that the appellant made no claim that the orders, considered alone, would affect the price of gas but as to that point based its entire argument on the consequences that were alleged to follow from the operation of the orders on appellant's contract with Republic. It is also significant that the Federal Power Commission, which may be assumed to be peculiarly cognizant of possible interferences with its own regulatory authority, expressly conceded that if the state orders released appellant from the obligations of its Republic A contract it would not contend that the state action "so impinged upon matters of national, as opposed to local, concern, or that it so interfered with the regulatory functions and purposes of the Federal Power Commission, under the Natural Gas Act, as to require its invalidation under the Supremacy Clause". (Memorandum for the FPC, pp. 21-22.)

4. The decision of the majority, if allowed to stand, substantially impairs, if it does not destroy, state regulation of gas conservation in its historic sense. By the same rationale as the Court here uses to strike down state ratable take orders all other conservation orders will fall. State allowable orders, state regulations requiring the casing of wells, regulations prohibiting the use of certain types of pumps, orders restricting production to a percent of a well's open flow and regulations controlling drilling operations and enforcing pooling in unitization will all fall if the reasoning of the majority opinion is consistently applied.

The policy determination to destroy the states' conservation powers, including the power to regulate the ratable taking of gas, should be undertaken by Congress and not this Court. This is particularly true

where judicial enunciation of such policy is inconsistent with expressed Congressional intent. As was clearly stated in the House Committee report concerning the Natural Gas Act: "The bill takes no authority from state commissions, and is so drawn as to complement and in no manner usurp state regulatory action."[2] We respectfully submit that it is impossible to reconcile this expressed Congressional intent with a decision that deprives the producing states of their long-established and well-recognized power to protect the correlative rights of their citizens by regulating the ratable taking or purchasing of natural gas. (For further discussion, see pp. 14-16 of Appellee's brief.)

Because of the importance of this case, the magnitude and diversity of the public and private interests involved, the sweeping nature of the reasoning embodied in the majority opinion and the fact that the opinion deprives the states of a power which they have long possessed and exercised, we submit that it is appropriate for this Court to reconsider the basis of its decision.

CONCLUSION

For the foregoing reasons The State Corporation Commission of the State of Kansas prays that this Court grant a rehearing of its judgment of February 18, 1963.

Respectfully submitted,

CHARLES C. MCCARTER
State Corporation Commission
State Office Building
Topeka, Kansas
Attorney for Appellee

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[2] H.R. Rep. No. 709, 75th Cong. 1st Session p. 2.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

CHARLES C. MCCARTER
Counsel for Petitioner